

EP 4/2006

BEFORE

HON'BLE JUSTICE B P KATAKEY

A public notice of intended election was published on 04.03.2006 by the Returning Officer of No.116 Dibrugarh Legislative Assembly Constituency, inviting nominations of candidates for such election as required under Section 31 of the Representation of the People Act, 1951 read with Rule 3 of Conduct of Election Rules 1961, specifying the place at which the nomination papers are to be delivered, with the following schedule.

- (i) Issue of notification : 10.03.2006.
- (ii) Last date for making nomination : 17.03.2006.
- (iii) Security of nomination papers : 18.03.2006.
- (iv) Last date for withdrawal of candidature : 20.03.2006.
- (v) Date of poll : 03.04.2006.
- (vi) Counting of votes : 11.05.2006.
- (vii) Date before which election process shall be completed : 20.05.2006.

2. The election petitioner, the approved candidate of Indian National Congress; the respondent No.2, the approved candidate of Bharatiya Janata Party as well as 6 other persons filed their nomination papers to contest from the said constituency. Upon scrutiny, the nomination papers submitted by one candidate Sri Banikanta Gogoi was rejected declaring his nomination as invalid, the same being not in order and the nomination papers submitted by the remaining 7 candidates were found to be in order and declared valid by the Returning Officer. Polling was thus held on 03.04.2006 and after counting of votes on 11.05.2006, result was declared declaring the respondent No.2 elected from the said No.116 Dibrugarh Legislative Assembly Constituency, he having secured highest number of valid votes polled. The respondent No.2/returned candidate secured 28,424 and the election petitioner secured 28,249 votes out of the total valid votes of 79,736.

3. The election petitioner has challenged the result of the said election, by presenting this election petition under Section 80, 80 A and 81 of the Representation of the People Act, 1951 (in short, the Act), dated 11.05.2006 declaring the respondent No.2 elected from the said No.116 Dibrugarh Legislative Assembly Constituency, on the ground that on the day of poll, i.e. on 03.04.2006, one notified polling station being No.124 was not set up in the notified school, namely Manik Dutta L.P. School (Madhya) and instead was set up in another school, namely Chiring Gaon Railway Colony L.P. School, without notifying the same and, thereafter, shifted to the notified school, namely Manik Dutta L.P. School (Madhya), without issuing any notification and without even intimating the election agents as well as other voters thereby violating the provisions of Section 25 and 58 of the Act, as well as the Conduct of Election Rules, 1961 (in short, the 1961 Rules), framed thereunder, thus depriving a large number of voters from casting their votes in the said polling station and consequently materially affecting the result of the election.

4. In the election petition, though the Returning Officer is not a necessary party, he has been added as respondent No.1, apart from the returned candidate as respondent No.2. The respondents, on receipt of the summons entered appearance. The respondent No.1, i.e. the Returning Officer, filed an affidavit-in-opposition, though there is no scope for filing such affidavit, however, on t

he prayer made and not being objected to by the election petitioner, as well as by the respondent No.2, the said affidavit-in-opposition has been treated as the written statement and taken on record. The respondent No.2/returned candidate also filed his written statement. In the said written statements filed by the Returning Officer as well as by the returned candidate, it has been contended that as both the schools, namely Manik Dutta L.P. School (Madhya) and Chiring Gaon Railway Colony L.P. School, are situated in close proximity, the election officials on the day prior to the date of poll wrongly set up the polling station in Chiring Gaon Railway Colony L.P. School instead of the notified L.P. School, namely Manik Dutta L.P. School (Madhya), which, during the continuance of poll, having been detected by the observer of the election commission (in short central observer), the polling station was restored to its notified location at Manik Dutta L.P. School (Madhya) at about 9.45 A.M. after observing all formalities and polling started in the said polling station at 9.55 A.M. It has further been contended that because of such wrong set up of polling station as well as shifting of the same to Manik Dutta L.P. School (Madhya), no voters were deprived from casting their votes in the said polling station and that the election petitioner never prior to the declaration of the result, i.e. on 11.05.2006, raised any objection about such initial setting up of the polling station and subsequent shifting and for the first time on 12.05.2006 filed an application before the Returning Officer claiming re-poll at No.124 polling station by contending that the said polling station was wrongly set up in Chiring Gaon Railway Colony L.P. School where the voters casted their votes from 7 A.M. to 12.45 P.M. and, thereafter, it was shifted to the notified school, namely Manik Dutta L.P. School (Madhya), without observing the required formality such as sealing of Electronic Voting Machine (EVM) and other materials.

5. On the basis of the pleadings of the parties and upon hearing the learned counsel, the following issues were framed:-

1. Whether the Election Petition is maintainable in present form and whether it has been filed, presented and verified in accordance with law?

2. Whether the Election Petition is liable to be dismissed for mis-joinder of the parties, i.e. respondent No.1?

3. Whether there is non compliance of provision of Section 25 and 58 of the Representation of People Act, 1951 and the Rules framed thereunder relating to shifting of polling station from one place to another and, if so, whether it has vitiated and materially affected the result of the election so far as it concerns the returned candidate?

4. Whether due to the sudden change and shifting of polling stations a large number of voters were deprived of their right to cast their votes, which has materially affected the result of the election of the returned candidate/respondent No.2?

5. Whether the election petitioner is entitled to the relief claimed in the Election Petition?

6. During the course of trial, certain original documents were called for from the custody of the Returning Officer, as prayed for, by the election petitioner as well as by the returned candidate, which were produced by the Returning Officer pursuant to the order passed by this Court. The election petitioner though filed evidence in affidavit of 20 (twenty) witnesses, he produced only 11 witnesses for cross-examination, namely the election petitioner (PW-1), Shri Dugdha Ch. Gogoi, the election agent of the election petitioner (PW-2), Shri Pusp Nath Sharma (PW-3), Shri Durlabh Kalita (PW-4), Shri Prasanta Dutta (PW-5), Shri Pranjal Bora (PW-6), Smti Baijanti Chubey (PW-7), Smti Subarna Bora (PW-8), Smti Pratima Bora (PW-9), Shri Bikash Kr. Chubey (PW-10) and Shri Deep Rabi Das

(PW-11), who were duly cross-examined by the respondent No.2/ returned candidate. None of these witnesses, however, were cross-examined by the respondent No.1. The election petitioner also examined the Returning Officer of No.116 Dibrugarh Legislative Assembly Constituency, namely Shri Ashutosh Agnihotri (PW-12), who was also cross-examined by the respondent No.2/returned candidate. Since the election petitioner did not examine any other person as his witness, the evidence of the election petitioner was closed vide order dated 22.02.2007. Consequently, the evidence-in-affidavit of the remaining 9 (nine) persons filed by the election petitioner, cannot be treated as evidence, in view of their non-production for cross-examination. After closure of the evidences of the election petitioner, the evidence on affidavit of 3 (three) witnesses of the respondent No.2/returned candidate, including himself, were filed and they were duly cross-examined. The respondent No.2 in support of his case as reflected in the written statement examined 7 (seven) witnesses, which includes the non-official witnesses, who have filed their evidence-on-affidavit, namely the respondent No.2 himself (RW-1), Smti Sabitri Das (RW-2), who was the polling agent of the respondent No.2 in No.124 polling station and Shri Mantu Das (RW-3), a BJP worker, as well as four official witnesses namely, Sri Durga Prasad Gogoi, the Presiding Officer of Polling Station No.124, (RW-4), Sri Partha Pratim Bairagi, the Constituency Magistrate, (RW-5), and Sri Neihu C. Thur, the Observer appointed by the Election Commission (in short, the Central Observer) (RW-6), who were duly cross-examined by the election petitioner. No witness was examined by the respondent No.1, who, however, was examined by the election petitioner as PW-12.

7. During the course of the trial the following documents were exhibited:

Ext. 1: Election petition filed by the election petitioner.

Ext. 2: Challan depositing a sum of Rs. 2,000/- (Rupees two thousand) by the election petitioner.

Ext. 3: Carbon copy of the complaint dated 3.4.2006 of Dugdha Chandra Gogoi, PW 2, Election Agent of the election petitioner (under objection from respondent No. 2)

Ext. 4: Application filed by the election petitioner before the Deputy Commissioner- cum- Returning Officer, 116 Dibrugarh Legislative Assembly Constituency, dated 12.5.2006.

Ext. 5: Reply of the Deputy Commissioner-cum- District Election Officer, Dibrugarh dated 20.5.2006 address to the election petitioner in reply to his complaint-dated 12.5.2006.

Ext. A: Certificate issued by Central Observer, Shir Neihu C. Thur, IAS, for No. 116 Dibrugarh Legislative Assembly Constituency, R.W. 6.

Ext. B: Written Statement (affidavit-in-opposition) filed by respondent No. 1, the Returning Officer.

Ext. C: List of Returning Officer, Assistant Returning Officers, in respect of No. 116 Dibrugarh Legislative Assembly Constituency.

Ext. D: List of Polling Agents of Polling Station No. 124 under No. 116 Dibrugarh Legislative Assembly Constituency.

Ext. E: Application in Form 10 submitted by the Election Agent of the respondent No. 2 for appointment of Smti Sabitri Das as Polling Agent in respect of No. 124 Polling Station.

Ext. F: Application in Form 10 submitted by the Election Agent of respondent No. 2 for appointment of Shri Rakesh Singh as Polling Agent in respect of No. 124 Polling Station.

Ext. G: Voters list of 2005 in respect of No. 116 Dibrugarh Legislative Assembly Constituency.

Ext. H: List of Polling Stations of 2006 in respect of No. 116 Dibrugarh Legislative Assembly Constituency.

Ext. I: Writing given by the Polling Agents dated 3.4.06 of the election petitioner, the respondent No. 2 and of the candidate of Assam Gana Parishad consenting to shifting of Polling Station.

Ext. J: Diary dated 3.4.2006 of Presiding Officer in respect of No. 124 Polling Station of No. 116 Dibrugarh Legislative Assembly Constituency.

Ext. K: Marked copy of the voters list in respect of Polling Station No. 124.

Ext. L: Final result sheet dated 11/5/06 in respect of No. 116 Dibrugarh Legislative Assembly Constituency.

Ext. M: Account of votes recorded in Form No. 17 C, in respect of Polling Station No. 124.

Ext. N: Application dated 8/8/06 filed by respondent No. 2 before the Circle Officer, East Circle Dibrugarh, for measurement of distance between Manik Dutta L.P. School and Chiringgaon Railway Colony L.P. School and to furnish a layout of the area.

Ext. O: Layout of area showing the boundary of Manik Dutta L.P. School as well as Chiringgaon Railway Colony L.P. School and the distance between the two schools.

Ext. P: List of persons appointed for conducting election in No. 116 Dibrugarh Legislative Assembly Constituency.

Ext. Q: Appointment letter of Shri Santosh Das as Polling Agent of the election petitioner in respect of No. 124 Polling Station.

Ext. R: Appointment letter of Shri Sidha Nanda Sensua as Polling Agent of the election petitioner in respect of No. 124 Polling Station.

8. Heard Mr. A. Mazumdar, the learned senior counsel for the election petitioner as well as Mr. A.K. Bhattacharyya, the learned senior counsel for the respondent No.2/returned candidate. None appears to argue the case on behalf of the respondent No.1. Perused the pleadings of the parties and the evidence on record, both oral and documentary.
SUBMISSIONS OF THE LEARNED COUNSEL FOR THE PARTIES.

9. Mr. Mazumdar, learned senior counsel for the election petitioner has contended that the main issues in the present election petition are the issues nos. 3 and 4. According to the learned senior counsel it is evident from the pleadings of the parties and also the deposition of the witnesses, more particularly the evidence of the Returning Officer (PW-12), Presiding Officer (RW-4), Constituency Magistrate (RW-5) and the Central Observer (RW-6) that the Polling Station No. 124 was not set up in the notified place i.e. Manik Dutta L.P. School (Madhya) notified under Section 25 of the Act. Referring to the deposition of t

hose witnesses Mr. Mazumdar has further submitted that the said official witnesses have in their deposition admitted that no notification or order was issued before setting up the polling station in the non-notified place as well as prior to shifting to the notified place, subsequently and without informing the voters.

Mr. Mazumdar referring to the provision of section 25 of the Act further submits that as the Polling stations are to be notified as per direction of the Election Commission, no poll can be held in a place other than the notified place and in the instant case according to the learned senior counsel, it is an admitted position of fact that No. 124 Polling Station was not set up in the notified place but was set up in another school where polling started at 7.00 a.m. and continued at least up to 9.45 p.m. on 03.04.2006. Such action, according to the learned senior counsel amounts to change in the location of polling station without the approval of the Election Commission, thereby violates the provision of Section 25 of the Act as well as the guidelines issued by the Election Commission to the returning officer, not to change the location of the polling station. The learned senior counsel further contends that such polling in the non-notified place cannot be the valid poll and therefore the entire polling in respect of No.124 Polling Station is vitiated. It is, therefore, submitted that the infraction of provision of Section 25 of the Act has been established. It has further been submitted by Mr. Mazumdar that after shifting of the Polling Station in question to the notified place i.e. Manik Dutta L.P. School (Madhya), the polling re-started in that place i.e. in the notified place, and since there is no separate account maintained about the vote polls in the non-notified place, the entire polling in respect of 124 Polling Station has to be declared illegal and the re-poll in respect of the said Polling Station is to be ordered.

10. Referring to the provision of Section 57 of the Act, it has further been submitted by Mr. Mazumdar that since the Polling Station was initially set up in a non-notified place, which itself is the infraction of the provision of the Act, the Presiding Officer of Polling Station No. 124 or the Returning Officer had no alternative but to adjourn the poll to a date to be notified later and thereafter to re-commence the poll after the date is fixed with previous approval of the Election Officer, which having not been done in the instant case, violates the provisions of Section 57 of the Act.

11. Mr. Mazumdar, referring to the provision of Section 58(1)(b) of the Act has further submitted that as the error in setting up of the Polling Station has been committed, the Returning Officer ought to have informed the Election Commission about such error/irregularities in procedure, so that the Election Commission in exercise of power conferred by Section 58(2) of the said Act could have passed appropriate order. According to the learned senior counsel, the Presiding Officer as well as the Returning Officer, therefore, have violated the provisions of Section 58 of the Act.

12. Mr. Mazumdar has further contended that even if the version of the respondents that the polling re-started in the notified place at 9.55 a.m., after shifting, is taken to be correct, then also the polling in that Polling Station is vitiated, because of non-starting of the poll at the time fixed by the Election Commission in the notified Polling Station i.e. at 7.00 a.m. as the same violates the provision of Section 56 of the Act and Rule 15 of the 1961 Rules.

13. Mr. Mazumdar, learned senior counsel referring to Rule 31 of the 1961 Rules submits that the presiding officer of a polling station is required to make certain arrangements as stipulated in the said Rule before conducting the poll in a particular polling station and in the instant case in the Polling Station No. 124, after it was shifted to the notified place i.e. Manik Dutta LP School (Madhya), no such arrangement was made and thereby violating the provision of Rule 31 of the 1961 Rules. It has further been submitted that as the poll conducted in the non notified place i.e. Chiringaon Railway LP school cannot be held to be valid poll and as the polling in notified place after the polling station was shifted having been conducted without making any arrangement as required under

r Rule 31 of the 1961 Rules, there was no poll at all in the Polling Station No. 124 in the eye of law and as such, it becomes an incomplete election. It has further been submitted that since the number of voters registered in the said polling station is 1005 and the overall percentage of polling in the constituency is 67.23% and the difference of votes polled by the returned candidate and the election petitioner being only 175, such violation of the provisions of the Act and the 1961 Rules has materially affected the result of the election. Mr. Mazumdar further submits that as there was no voting in the eye of law, in respect of polling station No. 124, presumption is to be drawn that it has materially affected the result of the election. Referring to the decision of the Apex Court in *Santosh Yadav vs Narender Singh* reported (2002) 1 SCC 160, the learned senior counsel submits that such presumption can be drawn in the case in hand also.

14. Placing reliance on the evidences of the witnesses examined by the election petitioner, it has further been submitted that it is evident from the deposition of the witnesses that a large number of persons could not cast their votes because of such setting up of the Polling Station in a wrong place i.e. in non-notified place and subsequent shifting to the notified place, thereby materially affecting the result of the election of the returned candidate. It has further been submitted that there being no separate accounts of vote polled maintained, while the Polling Station was set up in Chiringgaon Railway Colony L.P. School, having regard to the fact that only 572 numbers of votes were polled in the Polling Station, against the total registered voters of 1005, both when it was in the non-notified place as well as in the notified place and also keeping in view the difference of votes polled by the election petitioner as well as the returned candidate (Respondent No. 2), which was 175, the result of the election of the returned candidate must have been materially affected. Mr. Mazumdar referring to the complaint dated 03.04.2006 (Ext. 3) has contended that infraction of the provision of the Act was immediately brought to the notice of the Returning Officer.

15. The learned senior counsel, therefore, submits that election of the returned candidate may be set aside by declaring the polling in respect of No.124 Polling Station void and the Election Commission may be directed to conduct re-poll in respect of the said Polling Station and to declare result of the election in respect of No. 116 Dibrugarh Legislative Assembly Constituency after taking into account the votes polled in such Polling Station after re-poll. Mr. Mazumdar in support of his submission has placed reliance on the judgment passed in *Tazuddin Ahmed Vs. Dhaniram Talukdar*, (AIR 1959 Assam 128), *Bulia Ram Vs. Choudhury Multan Singh*, (AIR 1960 Punjab 45) and on an Apex Court judgment in *Hari Bishnu Kamath Vs. Ahmed Ishaque & ors* (AIR 1955 SC 233).

16. The learned Senior counsel for the respondent No.2/returned candidate, Mr. Bhattacharyya, has at the outset submitted that the issue No. 1 and 2 are not pressed by the returned candidate.

17. Refuting the arguments of the learned Senior counsel for the Election petitioner, Mr. Bhattacharyya, learned Senior counsel appearing for the respondent No.2/returned candidate has submitted that the High Court under Section 100 (1)(d)(iv) of the Act can declare the election of a returned candidate void if it must prove non-compliance of the provision of the Constitution or the Act or any rule or orders made thereunder and that such non-compliance has materially affected the result of the election of the returned candidate. According to the learned Senior counsel, the election petitioner, though in the election petition has pleaded that there is non-compliance/violation of the provisions of the Act and the 1961 Rules, has failed to substantiate such plea and hence the election petition is liable to be dismissed. Referring to Section 25 of the Act and Ext. J document, being list of notified polling station, Mr. Bhattacharyya has further submitted that there is no violation of Section 25 of the Act as admittedly Mani

k Dutta LP School (Madhya) was notified for setting up of the Polling Station No. 124 in respect of No. 116 Legislative Assembly Constituency, election of which was held in the year 2006. The learned senior counsel has further submitted that since it is not the case of the election petitioner that the polling station, as required to be notified under Section 25 has not been notified, there is no infraction of Section 25 of the said Act.

18. Referring to clause 9.4 of the Handbook on which the learned Senior counsel has placed reliance to drive home the plea that there was infraction of the provisions of the Act because of setting up of the polling station in a non notified place, Mr. Bhattacharyya has submitted that under clause 9.4 of the said guidelines the district election officer/returning officer has been asked not to make any change in the location of the polling station already approved by the Commission, without its prior approval. According to Mr. Bhattacharyya in the present case, the district election officer or the returning officer did not make any change in the location of the polling station already approved by the Election Commission but the polling station was wrongly set up in a non notified place, by mistake, which was rectified on detection by shifting the polling station to the notified place as instructed by the Central Observer. Therefore, according to Mr. Bhattacharyya there is even no violation of clause 9.4 of such guidelines issued by the Election Commission.

19. Referring to the pleadings in the election petition, it has further been submitted by the learned Senior counsel that there is absolutely no pleadings in the election petition regarding the violation of the provisions of Section 57 of the Act. In any case, Mr. Bhattacharyya submits that the pleadings in the election petition does not disclose any other sufficient cause for adjournment of the poll by the Presiding Officer in exercise of the power conferred by Section 57 of the Act, as setting up of the polling station in a non notified place cannot constitute 'sufficient cause' within the meaning of Section 57 of the said Act. Relying on the decision of the Madras High Court in P.S. Chellathurai vs K.P. Gopal & Anrs, reported in 1949 ELR 379, it has further been submitted by the learned senior counsel that the provisions of Section 57 being directory and the terminology 'any other sufficient cause' being relatable to riot, open violence or natural calamity, there is no question of exercising such power by the presiding officer or by the returning officer concerned to adjourned the poll on the grounds of setting up of the polling station in a non notified place or the subsequent shifting to the notified place.

20. Mr. Bhattacharyya has further submitted that Section 58 of the Act being in respect of the steps required to be taken by the returning officer in case of destruction etc., of the ballot boxes or Electronic Voting Machine (EVM), clause (b) of Sub Section (1) of Section 58 is also not attracted in the present case, as it is not the case of the election petitioner that there is any error or irregularity in the EVM. Mr. Bhattacharyya has further submitted that even assuming that any error or irregularity in conducting the election, even if it is not relating to the ballot boxes or the EVM, comes within the purview of Section 58 (1)(b) of the Act, the returning officer is not bound to report any error or irregularity to the Election Commission, unless such error or irregularity is likely to vitiate the poll. According to Mr. Bhattacharyya the election petitioner has miserably failed to prove that the setting up of the polling station in a wrong place and subsequently shifting to the notified place, likely to vitiate the poll, so as to report the matter to the Election Commission by the returning officer, in exercise of power conferred by Section 58 (1)(b). Mr. Bhattacharyya submits that in the instant case the polling station was set up by mistake in a non notified place where polling took place for about two and a half hour in the morning and thereafter between 9.30 to 9.45 A.M. the polling station was shifted to the notified place i.e. Manik Dutta LP School (Madhya) as instructed by the Central Observer and such mistake being bonafide mistake does not amount to non-compliance or violation of any of the provisions of the Act or the Rules or

the orders made thereunder.

21. Countering the arguments of the learned Senior counsel for the election petitioner that as the polling in the notified polling station was not held for the hours fixed by Election Commission, it amounts to infraction of Section 56 of the Act and Rule 15 of the 1961 Rules, and, therefore, constitutes the ground for setting aside the election of the returned candidate under Section 100(1)(d)(iv), Mr. Bhattacharyya has submitted that there is no infraction of Section 56 as well as Rule 15, as, admittedly the polling in respect of the polling station No. 124 started at 7 AM and concluded at 4 PM i.e. for the hours fixed by the Election Commission, may be part of it in a non notified place and the major part in the notified place. According to the learned Senior counsel Section 56 of the Act does not provide that the hours fixed by the Election Commission for polling is to be in a particular place. It has further been submitted by the learned Senior counsel that the hours fixed has to be reckoned from the time of starting till the conclusion of the poll and, therefore, the polling having been started in a non notified place at 7 AM, which was subsequently shifted to the notified place, where it concluded at 4 PM, there is no infraction of Section 56 of the Act, that too, when such mistake in setting up of the polling station and subsequent shifting was not objected to by any of the parties at the relevant time.

22. Mr. Bhattacharyya further submits that it is evident from the diary of the presiding officer, which has been exhibited as Ext. J, that between 7 AM to 9 AM on the date of polling i.e. 3.4.2006, when the polling station was in the non notified place, only 76 votes were polled and hence, in any case, even if there is infraction of provisions of the Act or the Rules framed thereunder, it has not materially affected the result of the returned candidate, the difference of votes polled by the election petitioner and the returned candidate being 175. It has further been submitted that though it is not required to examine as many voters as the difference of votes polled, the election petitioner, however, by adducing cogent and reliable evidence has to prove that significant number of voters could not cast their vote because of setting up of the polling station in a non-notified place, so as to materially affect the result of the election, which according to Mr. Bhattacharjee, the election petitioner has failed to do.

23. Referring to the evidence on affidavit filed by the witnesses of the election petitioner, namely, PW-2 to PW-11, Mr. Bhattacharjee has further submitted that as the oath on the said affidavits were administered by the Additional Deputy Commissioner and not by the Oath Commissioner of the High Court, before which the election petition has been filed, such affidavits are not admissible in evidence. That apart, according to the learned senior counsel, the evidence of PW 5 to PW 11 cannot be accepted as during cross-examination it has been admitted that they do not know what has been written in the affidavit and also admitted the discrepancies in such affidavits. Therefore, such evidence cannot be taken into consideration to arrive at a finding regarding infraction of the provision of the Act and the Rules framed thereunder as well as regarding materially affecting the result of the election. Mr. Bhattacharjee in support of his contention has placed reliance on the decision of the Apex Court in Chhotan Prasad Singh Vs. Hari Dusadh & Ors, reported in AIR 1977 SC 407.

24. Mr. Bhattacharjee further argues that even assuming the affidavit of those witnesses are admissible in evidence then also there is absolutely no evidence to prove that the infraction of any of the provision of the Act or the Rules framed thereunder has materially affected the result of the election. Referring to the deposition of the witnesses of the election petitioner, Mr. Bhattacharjee has further submitted that though the election petitioner has admitted setting up of the booth by Congress Party and manning the same by 10 to 15 persons near the polling station being Manik Dutta L.P. School (Madhya), he did not ex

amine any person, who was present in the booth on the date of poll, to prove that many persons have left the place without casting their votes, on the other hand, the returned candidate/respondent No.2 by examining RW-3, Sri Mantu Das, who was present in the booth set up by BJP near Manik Dutta L.P School (Madhya) and was present all along, has proved that in fact the persons manning the booth belonging to the Congress Party knew about the setting up of the polling station in Chirring Gaon Railway Colony L.P. School and such Congress worker manning such booth in fact led the voters, who came to cast their votes in Manik Dutta L.P. School (Madhya), to Chirring Gaon Railway Colony L.P. School for casting their votes. According to the learned Sr. counsel, it has come out in the evidence of the Returning Officer (PW-12), Presiding Officer (RW -4) as well as the Circle Officer (RW-5) that both the schools are visible from each other and within the distance of about 100 mtrs. Mr. Bhattacharjee, in that regard, has placed reliance on Exhibit-0 proved by RW-5. Therefore, according to the learned Sr. counsel, there is no question of any voters leaving the place without casting their votes because of setting up of polling station in a non-notified place.

25. Regarding the complaint dated 03.04.2006 (Exhibit-3) allegedly filed by Dugdha Ch. Gogoi (PW-2), it has been argued by Mr. Bhattacharjee that Dugdha Ch. Gogoi (PW-2) in his evidence, has admitted that the said document was not filed by him personally but was filed by another person namely, Prasanta Konwar, who has not been examined by the election petitioner. The Returning Officer, who has been examined by the election petitioner as one of his witnesses has also denied filing of any such complaint by Dugdha Ch. Gogoi on 03.04.2006. According to the learned senior counsel, the said document has been manufactured for the purpose of this case. In any case, according to the learned Sr. counsel, the said document, i.e. Exhibit-3, being the carbon copy is not admissible in evidence, the original having not been called by the election petitioner from the custody of the Returning Officer before whom it was alleged to have been filed. Mr. Bhattacharjee has further submitted that the election petitioner has also failed to prove the signature of the person who has allegedly received such complaint.

26. Mr. Bhattacharjee has further submitted that the election petitioner has failed to adduce any evidence to substantiate the plea that the EVM and other election materials were not duly sealed before it was shifted to the notified place and, on the other hand, the Returning Officer, the Presiding Officer, the Constituency Magistrate as well as the Observer appointed by the Election Commission, who have been examined as witnesses in the present proceeding have proved that those were properly sealed before shifting and no irregularity has been committed and no voters left the place without casting their vote because of setting up of polling station in a wrong place and subsequent shifting.

27. It has further been contended that the Court, while scrutinizing as to whether the alleged violation of the provision of the Act/Rules has materially affected the result of the election, is required to take into consideration the percentage of poll, the number of registered voters in the polling station in question, the number of candidates contested in the election as well as the percentage of votes polled by the election petitioner in such election. It has further been submitted that Court should also bear in mind the fact that the persons who alleged to have been deprived from casting of their votes because of non setting up of the polling station in the notified place may not cast their votes in favour of the election petitioner alone. Drawing the attention of the final result sheet (Exhibit L) as well as the presiding officer's diary (Ext. J), Mr. Bhattacharyya has further submitted that taking into account the percentage of votes polled, number of contestants in the field, the percentage of votes secured by the election petitioner in other polling station, it cannot be said that setting up of the polling station in a non notified place and its subsequent shifting to the notified place has materially affected the result of the election so as to declare the election of the respondent No. 2 void. According to the learn

ed senior counsel the Court cannot presume that the violation of the law materially affected the result of an election unless the same is specifically proved by the election petitioner. It has been submitted by Mr. Bhattacharyya that as because the polling station was set up in a non notified place, which is only 100 ft. away from the notified place, it is not possible to conceive that any voter could have any difficulty in finding the polling station and consequently would have been deprived from casting their votes.

28. Referring to the pleadings in the election petition, Mr, Bhattacharyya has contended that the petitioner has not pleaded the material facts as to how the election of the returned candidate has been materially affected because of the infraction of the provision of the Act and the 1961 Rules, though Section 83 of the Act requires that the election petition shall contain a concise statement of the material facts on which the petitioner relies. Mr. Bhattacharyya, therefore, submits that in the absence of pleading of material facts relating to materially affecting the result of the election, this Court shall not declare the election of the respondent No. 2 void, as any amount of evidence, which has no basis on the pleading cannot be read. Mr. Bhattacharyya in support of his contention has placed reliance on the decision of the Apex Court in Santosh Yadav (supra) as well as in Gursewak Singh Vs. Avtar Singh & Ors, reported in (2006) 4 SCC 542.

29. Mr. Bhattacharyya in support of his contentions has placed reliance on the decision of the Mysore High Court in Sangappa Andanappa vs Shivamurthi Swamy Siddppalyaswamy (AIR 1961 Mysore 106), the decision of the Madhya Pradesh High Court in Sayed Ahmed vs Brijendra Nath Pathak & ors. (AIR 1998 Madhya Pradesh 293), and the Apex Court's judgment in Vashist Narain Sharma vs Dev Chandra & ors. (AIR 1954 SC 513), in Ram Singh, Kidar Singh vs Ghasi Ram Sheo Nath & ors. (AIR 1955 NUC 5801), in Mahadeo vs Babu Udai Partap Singh & Ors. (AIR 1966 SC 824), in Paokai Haokip vs Rishang & ors. (AIR 1969 SC 663), in Uma Ballav Rath vs Maheshwar Mohanty & Ors. (AIR 1999 SC 1322), in Shri Beli Ram vs Shri Nand Kumar & Ors. ((1977) 2 SCC 109), and in Santosh Yadav vs Narendra Singh ((2002) 1 SCC 160).

30. Referring to the decisions cited by the learned senior counsel for the election petitioner it has been contended by Mr. Bhattacharyya that the decision in Tazuddin Ahmed (Supra) cannot be held to be a good law because of the subsequent pronouncements of the Apex Court in various decisions cited by him including in Paokai Haokip (supra). Regarding the decision of the Punjab High Court in Bulia Ram (supra), and the decision of the Apex Court in Hari Bhisnu Kamath (Supra) on which the learned senior counsel for the election petitioner has placed reliance, it has been submitted that the said decisions instead of supporting the case of the election petitioner supports his contention that mere infraction of the provision of the Constitution or the Act or the 1961 Rules would not ipso facto render the election of the returned candidate void unless such infraction has materially affected the result of the election and the burden of establishing the same is on the person who seeks the election to be set aside i.e. the election petitioner. Mr. Bhattacharyya, therefore submits the election petition deserves to be dismissed with cost.

31. Mr. Mazumdar, in reply to the arguments of the learned Senior counsel for the respondent No.2/returned candidate, has submitted that defect in the evidence on affidavit filed by the witnesses of the election petitioner cannot be a ground for rejection of such affidavit, as, such defect is curable. In support of such submission, Mr. Mazumdar has referred to the decision of Apex Court in G. Mallikarjunappa & Anr. Vs. Shamanur Shivashankarappa & Ors, reported in (2001) 4 SCC 428. It has further been submitted by Mr. Mazumdar that Section 83 of the Act requires the election petitioner to make a concise statement of material facts and not the evidence. According to Mr. Mazumdar, the election petition contains concise statements of material fact on which the petitioner relies, th

Therefore, it cannot be said that there is no pleading relating to materially affecting the result of the election because of the infraction of the provision of the Act and the 1961 Rules. Mr. Mazumdar referring to Ext. J i.e. the presiding officer's diary has submitted that such document is fabricated one as the sentence in the second page of the said document 'but after proper discussion it is shifted to Manik Dutta LP school (Madhya) on 3.4.3006 at 9.45 AM has been inserted subsequently to show the shifting of the polling station to the notified place at 9.45 AM and, therefore, such documents cannot be relied upon at all for any purpose. In any case, according to Mr. Mazumdar the election petitioner by adducing the evidence of PW 2 to 11 could prove that a large number of voters could not cast their votes because of non-setting up of the polling station in the notified place and its subsequent shifting. It has further been submitted that as the poll conducted in respect of the polling station No. 124 is no poll in the eye of law it is to be presumed that the same has materially affected the result of the election.

DECISION AND REASONS THEREOF:

32. ISSUE NO.1:

(i) Whether election petition is maintainable in the present form and whether it has been filed, presented and verified in accordance with law.

ISSUE NO.2:

Whether the Election Petition is liable to be dismissed for mis-joinder of the parties, i.e. respondent No.1?

Both the issues having not been pressed into service, by the learned Senior counsel for the respondent No.2, have not been discussed on merit. The issues are, therefore, decided against the respondents and in favour of the election petitioner.

33. ISSUE Nos.3 AND 4:-

3. Whether there is non compliance of provision of Section 25 and 58 of the Representation of People Act, 1951 and the Rules framed thereunder relating to shifting of polling station from one place to another and, if so, whether it has vitiated and materially affected the result of the election so far as it concerns the returned candidate?

4. Whether due to the sudden change and shifting of polling stations a large number of voters were deprived of their right to cast their votes, which has materially affected the result of the election of the returned candidate/respondent No.2?

(i) Both these issues being interrelated, are required to be discussed together and accordingly those are taken up for discussion and decision together.

(ii) The election petitioner, in the present election petition has challenged the election of respondent No.2/returned candidate on the ground enumerated in Sub-Clause (iv) of Clause (d) of Sub-Section (1) of Section 100 of the Act by contending that the provisions of Section 25 and 58 of the said Act have been violated. During the course of argument it has further been contended by the learned Senior counsel for the election petitioner that there has been violation of the provisions of Section 56 and Section 57 of the Act and Rule 15 of the 1961 Rules.

(iii) Section 100 of the Act provides the grounds on which an election can be declared void. Sub-Section (1) (d) of the said Section provides that the High Court shall declare the election of the returned candidate void, if the re

sult of the election, in so far as it concerned the returned candidate, has been materially affected:-

- (i) by the improper acceptance of any nomination, or
- (ii) by any corrupt practice committed in the interest of the returned candidate, by an Agent other than his Election Agent, or
- (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or
- (iv) by any non-compliance with the provisions of the Constitution or of the Act or of any rules or orders made under the Act.

(iv) Reading of Section 100 (1)(d), reveals that the High Court cannot declare election of a returned candidate void, on any of the ground enumerated in Sub-clause (i), (ii), (iii) or (iv) of Clause (d) of Sub-Section (1) of Section 100 unless, result of the election in so far as the returned candidate is concerned, has been materially affected. The election petitioner, in an election petition filed on such ground, is, therefore, first required to prove the existence of any of the aforesaid grounds, then that it has materially affected the result of the returned candidate. In the instant case, as discussed above, since the election petition has been filed challenging the result of the returned candidate on the ground of non-compliance of the provisions of the Act and the 1961 Rules framed thereunder, the election petitioner has to prove such non-compliance and also that the same has materially affected the result of the election. The mere non-compliance of any of the provision of the Act or the Rules framed thereunder without materially affecting the result of the election of the returned candidate would, therefore, not be sufficient to declare the result of the returned candidate void, by the High Court under Section 100 (1) (d) (iv) of the Act, which view has taken by this Court in Tazuddin Ahmed, by Mysore High Court, in Sangappa Andanappa, by Punjab High Court, in Bulia Ram, by M.P. High Court, in Sayed Ahmed, by the Apex Court in Vashist Narain Sharma, in Hari Bishnu Kamath, in Mahadeo, in Paokai Haokip, in Shri Beli Ram, in Uma Ballav Rath & in Santosh Yadev (Supra).

(v) Keeping in view the aforesaid legal position, I shall now discuss the evidences on record as adduced by the parties in the present election petition.

(vi) The issue Nos.3 and 4 have two parts, the first part relating to non compliance of the provision of the Act and the 1961 Rules framed thereunder alleging setting up of polling station in a non-notified place and its subsequent shifting to the notified place and the second part relates to whether such non-compliance of the provision of the Act and the Rules has materially affected the result of the election so far it concerned the returned candidate. I shall now first discuss the evidences relating to the first part.

(vii) As discussed above, the pleaded case of the election petitioner is that Manik Dutta L.P. School (Madhya) was the notified place for setting up of No.124 polling station but the same was not set up in such notified place but was set up in another school namely, Chiring Gaon Railway Colony L.P. School, which according to the petitioner is 1% Km. away. It is the further case of the election petitioner in the election petition that during the course of the poll on 03.04.2006, the said polling station was shifted from the said school namely, Chiring Gaon Railway Colony L.P. School, to the notified place, namely Manik Dutta L.P. School (Madhya), at about 12.30 PM. The Returned Candidate/respondent No. 2 in the written statement has also admitted that the said polling station was not initially set up in the notified place, i.e. Manik Dutta L.P. School (Madhya), but was set up in Chiring Gaon Railway Colony L.P. School, however, during the

course of the poll when it was detected by the central observer, the same was shifted to the notified place at around 9.45 AM after observing all formalities and the poll re-started in that place at about 9.55 AM. The respondent No.2/Returned Candidate, disputing the distance between the two schools, has stated in the written statement that it is only about 100 meter. The respondent No.1, the Returning Officer in the written statement has also admitted the setting up of the said polling station in a non-notified area and subsequent shifting to the notified place, which according to the said respondent, was about 9.30 to 9.45, AM. Therefore, the respondents have in their pleadings, admitted that Polling Station No. 124 was not set up in the notified place initially but was subsequently shifted to the notified place. The evidence of the election petitioner (PW 1) as well as his election agent (PW 2), have been supported by the Returning Officer (PW 12), the respondent No. 1 (R.W. 1), Presiding Officer (R.W. 4), Constituency Magistrate (R.W. 5) as well as the Central Observer (R.W.6) in that regard. However, there is dispute relating to time of such shifting as well as the distance between the said school, which will be dealt with later in this judgment.

(viii) Section 25 of the Act requires the District Election Officer to provide a sufficient number of polling station for every constituency and for publication of a list showing the polling stations so provided and the polling areas and groups of voters for which they have respectively being provided, with the previous approval of the Election Commission. It is not the case of any of the parties that Exhibit-H, i.e. the list of the notified place for setting up of different polling stations were not published with the previous approval of the Election Commission. Exhibit-H reveals that Manik Dutta L.P. School (Madhya) was the place notified for setting up of the polling station in question namely, No. 124 polling station, however, such polling station was not set up in the notified place initially but was set up in Chiring Gaon Railway Colony L.P. School, which was, however, subsequently been shifted to the notified place during the continuance of the poll on 03.04.2006.

(ix) The requirement of notifying the polling stations under Section 25 of the Act is not for nothing. It has definite purpose. By notifying the polling stations, with the previous approval of the Election Commissioner, the voters are intimated the areas false in each of such Polling Stations and also about the place in which they are to cast their votes. Therefore, Polling Station has to be set up at the place notified under Section 25 of the Act and nowhere else. The contention of the respondent No. 2/returned candidate that as it is not the case of the election petitioner that no place for setting up of No. 124 Polling Station was notified, the setting up of the Polling Station in a place other than the notified place would not amount to violation or non-compliance of the provisions of Section 25 of the Act, cannot, therefore, be accepted, as, such setting up of a Polling Station in a non-notified place is not permissible under the Act. Hence, there is non-compliance of provision of Section 25 of the Act.

(x) The further case of the election petitioner is that section 56 of the Act having provided the fixation of time for poll and Rule 15 of 1961 Rules having provide that the hours fixed for poll under Section 56 shall be published by a notification in the official gazette and such time for poll having been notified by the authority as required under the provisions of law, such poll has to be in the place notified under Section 25 of the Act and for the said notified hours, which in the case in hand has been violated. On the other hand, the contention of the respondent No. 2/ returned candidate is that the polling hours having admittedly been commenced at 7 am and continued till 4 pm, part of which may be in a non-notified place, there is no violation of the provisions of section 56 of the Act.

(xi) In the instant case, it is evident from the deposition of the parties and also not disputed by the learned senior counsel appearing on behalf of the election petitioner as well as the respondent No. 2 that the polling started

d in Chiringgaon Railway Colony L.P. School i.e. non-notified place at 7 am and continued, at least till 9.45 am. Though there is dispute relating to time of shifting of the Polling Station, it is admitted by the respondent No. 2 that the place of poll was shifted to the notified place around 9.45 am on the date of poll i.e. on 3.4.2006 and polling restarted in the notified place around 9.55 am, even if his stand on the time of shifting of Polling station is accepted. It is also admitted by the respondent No. 2 that polling in the notified place did not commence at 7 am till at least 9.55 am, though the time of poll was notified to be 7 am to 4 pm. Such hours for poll fixed by the authority under section 56 of the Act as notified under Rule 15 of 1961 Rules has to be in relation to notified polling station. The time spent for poll in the non-notified place cannot be treated as time for poll in a notified place. Therefore, the provisions Section 56 of the Act has also been violated by not conducting the poll for the hours in the notified polling station, as fixed by the Election Commission and notified under the Rule 15 of 1961 Rules.

(xii) The next contention of the election petitioner is that the Presiding Officer having found that the Polling Station No. 124 was set up in a non-notified place is duty bound to adjourn the poll in the said Polling Station, in exercise of power conferred by Section 57(1) of the Act and having not done so, the said provisions has been violated, as setting up of polling station in such non-notified place amounts to 'sufficient cause' within the meaning of Section 57 of the Act. The respondent No. 2/returned candidate has contended that the terminology 'any other sufficient cause' is relatable to riot or open violence or natural calamities as provided in sub-section (1) of Section 57 of the Act and setting up of Polling Station in a non-notified place cannot be a ground for exercising power under Section 57 of the Act. It has further been contended that the said provision being directory in nature, violation of it would not give rise to the ground to set aside the result of the election of the returned candidate. It has further been contended that there being no pleadings in the election petition relating to the violation of the provisions of section 57 of the Act and also in the absence of any evidence adduced by the election petitioner, his contention relating to the violation of such provision of law cannot be accepted.

(xiii) Perusal of the pleading in the election petition, reveals that the electioneer has not pleaded any violation of the provision of Section 57 of the Act or that the setting up of the polling station in a non-notified place and its subsequent shifting to the notified place, amounts to 'sufficient cause' within the meaning of the said provision of law. The election petitioner has also not led any evidence to that effect and no issue was also framed.

(xiv) Sub-section (1) of Section 57 of the Act empowers the Presiding Officer to adjourned the poll to a date to be notified later on, in the event the proceedings at any polling station provided under Section 25 or at the place fixed under Section 29(1) for the poll are interrupted or obstructed by any riot or open violence or if at an election is not possible to take the poll in any polling station or such place on account of any natural calamity, or any other sufficient cause. Before exercising the power under the said provision of law, the presiding officer, therefore, must satisfy that the poll in any polling station as notified under Section 25 is interrupted or obstructed by any riot or open violence or it is not possible to take the poll at any polling Station on account of any natural calamity or on 'any other sufficient cause', such 'sufficient cause' has to be related to the riot or open violence or any natural calamity as the 'any other sufficient cause' has to be read ejusdem generis with the word preceding in section 57(1). In the instant case, it is not the case of the election petitioner that poll in Polling Station No. 124 was interrupted or obstructed on account of riot or open violence or it was not possible to take the poll on account of any natural calamity. Hence, the contention of the election petitioner in that regard cannot be accepted and hence rejected. My said view has the support in the judgment passed by the Madras High Court in P.S. Chellathurai (Supr

a). Having held so, I do not consider it necessary to decide as to whether the provision of Section 57 is directory or mandatory.

(xv) The next contention of the election petitioner is relating to the violation of Section 58 of the Act. It has been pleaded in the election petition that by setting up of Polling Station No. 124 in a non notified place and its subsequent shifting to the notified place, the error or irregularities in the procedure in setting up of the polling station and in conducting election has been committed and therefore the Returning Officer was required to report forthwith to the Election Commission, such error or irregularities to the Election Commission, as required under Section 58(1)(b) of the Act, so that the Election Commission could take the proper decision as required under Sub-section (2) of that section. Such argument has been countered by the respondent No. 2 by contending that the provisions of Section 58 can be exercised only when there is destruction of ballot boxes, EVM and in any case, there being no pleading or evidence led by the election petitioner that such error or irregularities likely vitiate the poll, the Returning Officer has not committed any illegality in not reporting the matter to the Election Commission.

(xvi) Section 58 (1) of the Act cast a duty on the Returning Officer to report to the Election Commission in case (a) any ballot box used at the Polling Station or at a place for the poll is unlawfully taken out of the custody of the Presiding Officer or the Returning Officer or is accidentally or intentionally destroyed or lost or is damaged or tampered with, to such an extent, that the result of the poll at that polling station cannot be ascertained; or (aa) any voting machine develops mechanical failure during the course of recording of votes or (b) any such error or irregularities in procedure as is likely to vitiate the poll is committed at the polling station or at a place fixed for that purpose. It is not the case of the election petitioner that any ballot box used in the polling station has been taken out of the custody of the Presiding Officer or Returning Officer or destroyed or lost or damaged or tampered with or any voting machine developed any mechanical failure during the course of recording of votes. The contention, as discussed above, is that there has been an error or irregularity in procedure in conducting the poll as the polling station was set up in a non-notified place and such action amounts to error or irregularity in procedure, within the meaning of Section 58(1)(b) of the Act. Such contention of the election petitioner also cannot be accepted for the reason that clause (b) of Sub-section (1) cannot be read in isolation, which has to be read in the context of clause (a) or (aa). Therefore, the error or irregularity in procedure must be related to the ballot box or the voting machine. Hence, the contention of the election petitioner in that regard cannot be accepted.

(xvii) The election petitioner has further contended that the provisions of Rule 31 of 1961 Rules has been violated by not making necessary arrangements as required to be made after shifting of the Polling Station to the notified place at Manik Dutta L.P. School (Madhya). The said contention of the election petitioner cannot be accepted on the ground that there is no pleading to that effect in the election petition and no issue was framed in that regard and even no evidence is led. Only during the course of argument it has been contended that the provisions of Rule 31 has been violated. Moreover, though the election petitioner has examined the Returning Officer (PW 12) and also thoroughly cross-examined the Presiding Officer (R.W. 4), the Constituency Magistrate (R.W. 5) and the Central Observer (R.W.6) he did not even put any suggestion to that effect. Therefore, the said contention of the election petitioner also cannot be accepted.

(xviii) The further the contention of the election petitioner that as the poll in Polling Station No. 124 was not conducted in accordance with law, the same is vitiated, amounting to incomplete election and hence election of the returned candidate is to be declared void, also cannot be accepted, as the result of election of the returned candidate cannot be declared void by this Court, unless

ss the election petitioner proves, by adducing cogent and reliable evidence, that the non-compliance of the provisions of the Constitution or of the Act or of the Rules or orders made under the Act has materially affected the result of the returned candidate.

(xix) The case of the election petitioner that such shifting was made to the notified place without sealing of the EVM and other election materials cannot be accepted, as, except the election petitioner, no other persons present in Chiring Gaon Railway Colony L.P. School at that point of time stated anything about the non-sealing of the EVM and other election materials. The petitioner admittedly was not present in the said school as he has stated in his deposition that on the date of poll, he could not visit either of the schools where No.124 polling station was set up. PW-2, PW-3 and PW-4, who were stated to be present, also did not state anything regarding non-sealing of the EVM and other election materials. The election petitioner even did not produce the Polling Agents appointed by him in respect of polling station No.124 to prove that EVM and other election materials were not sealed. On the other hand, the respondent No.2/returned candidate by producing the RW-2, Smti Sabitri Das as well as RWs-4, 5, 6 and 7, namely the Presiding Officer, Polling Officer, Constituency Magistrate and Central observer have proved that before shifting of the polling station from Chiring Gaon Railway Colony L.P. School to Manik Dutta L.P. School (Madhya), the EVM and other election materials were duly sealed as required under the law. RW-4 has also proved the consent in writing given by the Polling Agents of the election petitioner and Polling Agents of other candidates including the respondent No.2 in shifting the said polling station to the notified place after sealing of the EVM and other election materials.

(xx) Having held that there is non-compliance of the provision of Sections 25 and 56 of the Act, the next question, which requires consideration is whether such non-compliance has materially affected the result of the election. The question as to whether the infraction of law has materially affected the result of the election or not, is purely a question of fact. Relying on the decision of the Apex Court in Santosh Yadav (supra), though it has been contended by the learned counsel for the election petitioner that the presumption can be drawn that the result of the election of the returned candidate has been materially affected because of the setting of the polling station in a wrong place and subsequent shifting, no such presumption, in my opinion, can be drawn, as Section 100(1)(d) of the Act in clear terms provide that the election of the returned candidate can be declared void on any of the ground enumerated therein, provided such ground materially affected the result of the election. Presumption is an inference of certain facts drawn from other proved facts. Therefore, the fact that such infraction has materially affected the result of the election must be proved.

There must be positive proof of the fact that significant numbers of voters could not cast their votes because of change in the place of setting up the polling station, which burden is on the election petitioner. The Apex Court in Santosh Yadav (Supra) referring to Section 100(1)(c) and (d) has observed that there is clear distinction between improper rejection of nomination and in proper acceptance of nomination and to void an election on the ground of improper rejection of nomination, the law does not require proof that the result of the election has been materially affected. The fact that one of the several candidates for an election was kept out of the arena is by itself a very material condition. But in case of improper acceptance of nomination, it is required to prove by adducing evidence demonstrating that coming into the arena of additional candidate has had the effect on the election in such a manner that the best choice of the electorate was excluded. Therefore, the decision in Santosh Yadav (Supra) does not support the contention of the election petitioner. The apex Court in Uma Ballav Rath (Supra) also observed that unless the election petitioner by adducing cogent and reliable evidence proves that infraction of law has materially affected the result of the election of the returned candidate, the election of the returned candidate cannot be declared void. It has further been observed that an el

ection cannot be set aside on presumption, surmises or conjecture.

(xxi) I shall now discuss the evidence on record as adduced by the parties, relating to time of shifting of polling station from the non-notified place to the notified place as well as the distance between the aforesaid two places (scho